Genting Sanyen Industrial Paper Sdn Bhd v WWL Corrugators Sdn Bhd

HIGH COURT (IPOH) — WINDING UP NO 28–58 OF 1998
CLEMENT SKINNER JC
25 AUGUST 1999

Companies and Corporations — *Winding up — Petition under s 218 — Inability to pay debts — Petition by unsecured creditor — Exercise of discretion of court, matters to be considered — Interest of creditors to be foremost consideration — Only company opposed petition — Whether petition should be granted*

The petitioner filed a petition to wind up the respondent company on the ground that the company was unable to pay its debt. Only the company had given notice of intention to oppose the petition. No creditor of the company had done so. Two months after the presentation of the petition, a major creditor of the company ('the bank') appointed the receiver and manager of the company. To oppose the winding up, the company had, through the receiver and manager, filed an affidavit stating reasons why it would not be just and equitable to order a winding up. It was submitted that there could be no possible benefit to the petitioner, who was an unsecured creditor, to persist in seeking a winding up order since the bank would take the first bite in any realization whereas a receiver and manager had already been appointed and has said that the bank's security could be far better realized as a going concern whereas the appointment of a liquidator on a winding up order being made would not result in any benefit to the company or to its creditors but instead result in paralysis to the company and impair the realization of the bank's security. Therefore, although a presumption of insolvency had arisen against the company because of its failure to comply with the statutory demand for payment, the court should exercise its overriding discretion not to order a winding up. It was also submitted that as there was opposition to the winding up and since good reasons had been given for such opposition, the petitioner must show special circumstances to warrant the making of a winding up order.

Held, ordering that the company be wound up:

(1) The discretion of the court is affected by where the opposition is coming from and who the opposer is and whether he is a secured or unsecured creditor and whether he belongs to a class and if so whether he represents the majority or minority view. In the present case, the only opposition proceeded from the company itself but the debt had not been disputed and no attempt had been made to show that the company was not insolvent. In these circumstances, the foremost consideration must be the interest of the creditors; and in this case, only one creditor was before the court and an unsecured creditor at that, whose views must prevail over that of the company or its shareholders (see pp 39I, 40F–G).

(2) The arguments put forward by the company were not really arguments for the benefit of the creditors or the company or its shareholders but were directed at preventing an impairment of the security of the bank or to facilitate the bank maximizing recovery on its security. To that extent, very little weight could be given to the submissions because it did not lie in the mouth of the receiver and manager to espouse the cause of creditors who were not before the court and it would be unjust to deprive an unsecured creditor of his statutory remedy so as to facilitate the bank who in giving the loan must be taken as having bargained to take the security it had as its protection against the loss in the event of a winding up (see p 40G–I).

(3) Insufficient material had been placed before the court to enable the court to meaningfully consider the exercise of discretion in favour of the company. No evidence was placed as to what the assets of the company consisted of and what their values were and why it would be best that they be sold before later than sooner. No attempt was made to show whether if allowed, there was good prospects of the company being able to trade out of its difficulties or whether there were outstanding commitments or contracts which made the company an attractive proposition to be sold off as a going concern in which event it would be desirable to at least postpone any winding up (see p 41B–E).

(4) Before the onus to show special circumstances passed to the petitioner, there must first be good reasons shown. The court had found none here and so the petitioner faced no such task (see p 41F).

[Bahasa Malaysia summary

Pempetisyen telah memfailkan suatu petisyen untuk menggulung syarikat responden atas alasan bahawa syarikat tersebut tidak mampu untuk membayar hutang-hutangnya. Hanya syarikat tersebut yang telah memberikan notis menentang petisyen tersebut. Tiada pemiutang syarikat yang berbuat demikian. Setelah dua bulan petisyen itu diserahkan, pemiutang utama syarikat tersebut ('bank tersebut') telah melantik seorang penerima dan pengurus syarikat tersebut. Bagi menentang penggulungan itu, syarikat itu telah, melalui penerima dan pengurus, memfailkan suatu afidavit menerangkan sebab mengapa adalah tidak adil dan ekuiti untuk mengarahkan suatu penggulungan. Adalah dihujahkan bahawa tidak mungkin wujud manfaat kepada pempetisyen, seorang pemiutang yang tidak mempunyai jaminan, untuk terus memohon suatu perintah penggulungan kerana bank tersebut akan mendapatkan apa-apa realisasi tatkala seorang penerima dan pengurus telahpun dilantik dan telah mengatakan bahawa sekuriti bank mungkin lebih berfaedah direalisasikan sebagai suatu yang masih berterusan manakala pelantikan seorang penyelesai kepada perintah penggulungan yang telah dibuat tidak akan menghasilkan apa-apa manfaat kepada

A syarikat tersebut atau kepada pemiutang-pemiutangnya, sebaliknya akan melumpuhkan syarikat itu dan merosakkan realisasi sekuriti bank tersebut. Oleh itu, walaupun wujud suatu andaian tak solven terhadap syarikat tersebut kerana kegagalannya untuk mematuhi tuntutan statutori untuk pembayaran, mahkamah hendaklah melaksanakan budi bicaranya yang utama untuk tidak memerintahkan B suatu penggulungan. Adalah juga dihujahkan bahawa memandangkan terdapat tentangan kepada penggulungan tersebut dan memandangkan alasan baik telah diberikan untuk tentangan itu, pempetisyen perlu menunjukkan keadaan-keadaan khusus untuk mewarankan suatu perintah penggulungan dibuat.

C

Diputuskan, mengarahkan syarikat tersebut digulungkan:

(1) Budi bicara mahkamah terjejas berdasarkan dari mana tentangan datang dan siapakah penentang tersebut dan sama ada beliau adalah seorang pemiutang yang mempunyai jaminan atau tidak dan sama ada beliau terdiri daripada suatu kelas dan jika begitu D sama ada beliau mewakili pandangan majoriti atau minoriti. Di dalam kes ini, penentangan hanya bermula daripada syarikat itu sahaja tetapi hutang tersebut tidak dipertikaikan dan tiada cubaan telah dibuat untuk menunjukkan bahawa syarikat bukanlah tidak solven. Di dalam keadaan ini, kepentingan pemiutang merupakan pertimbangan utama; dan di dalam kes ini, hanya terdapat satu E pemiutang yang berhadapan dengan mahkamah dan pemiutang itu tidak mempunyai jaminan; maka, pandangannya semestinya mengatasi syarikat dan pemegang-pemegang sahamnya (lihat ms 39I, 40F–G).

(2) Hujah-hujah yang dikemukakan oleh syarikat tersebut sebenarnya F bukan hujah-hujah untuk manfaat pemiutang atau syarikat tersebut atau pemegang-pemegang sahamnya tetapi bertujuan untuk menghalang kehilangan sekuriti bank atau memberi kemudahan tuntutan maksima bank ke atas sekuriti-sekuritinya. Setakat itu, tidak banyak penekanan yang boleh diberikan terhadap penghujahan tersebut kerana ia tidak terletak kepada G penerima dan pengurus untuk menyokong hak pemiutang yang tidak hadir di mahkamah dan ia adalah tidak adil untuk melucutkan pemiutang yang tidak terjamin terhadap remedi statutori beliau bagi tujuan memberi kemudahan kepada bank yang semasa memberikan pinjaman harus diambil kira sebagai telah bersetuju untuk mengambil jaminan tersebut sebagai H perlindungannya terhadap kerugian sekira berlakunya suatu penggulungan (lihat ms 40G–I).

(3) Bahan yang tidak mencukupi telah dikemukakan di mahkamah bagi membolehkan mahkamah mempertimbangkan dengan baik pelaksanaan budi bicara bagi pihak syarikat tersebut. Tiada I keterangan telah diberikan tentang kandungan aset-aset syarikat itu dan nilai aset-aset itu dan mengapa adalah terbaik agar aset-aset dijual pada masa kemudian. Tiada cubaan telah dibuat untuk menunjukkan bahawa jika dibenarkan, terdapat peluang baik bagi

syarikat itu untuk menyelesaikan permasalahannya atau sama ada wujud komitmen atau kontrak yang tertunggak yang menjadikan syarikat tersebut suatu usul yang menarik untuk dijual sebagai suatu entiti yang berterusan di mana adalah elok untuk sekurang-kurangnya melengahkan apa-apa penggulungan (lihat ms 41B–E).

(4) Sebelum beban untuk menunjukkan keadaan-keadaan khas diserahkan kepada pempetisyen, terlebih dahulu perlu ditunjukkan suatu alasan baik. Mahkamah tidak menjumpai apa-apa di sini dan, oleh demikian, pempetisyen tidak perlu berhadapan dengan tugas tersebut (lihat ms 41F).]

Notes

For cases on petition under s 218, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 846–848.

Cases referred to

Cetico Sdn Bhd v The Tropical Veneer Co Bhd [1988] 2 MLJ 665 (refd)
Crigglestone Coal Co Ltd, Re [1906] 2 Ch 327 (refd)
Datuk Mohd Sari bin Datuk Hj Nuar v Idris Hydraulics [1997] 5 MLJ 377 (refd)
Great Eastern Hotel (Pte) Ltd, Re [1989] 1 MLJ 161 (refd)
Kim Wah Theatre Sdn Bhd v Fahlum Development Sdn Bhd [1990] 2 MLJ 511 (refd)
London and Paris Banking Corp, Re (1875) LR 19 Eq 444 (refd)
P & J Macrae Ltd, Re [1961] 1 All ER 302 (refd)
Securicor (M) Sdn Bhd v Universal Cars Sdn Bhd [1985] 1 MLJ 84 (refd)
Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1992] 1 MLJ 313 (refd)

Legislation referred to

Companies Act 1965 ss 218(2)(a), 221
Companies Winding-up Rules 1972 r 28

HW Wong (*Wong Hai Wai & Associates*) for the petitioner
Ng Sai Yeang (*Raja Darryl & Loh*) for the respondent.
D Gunasegaran (*Yacob bin Shafei* with him) for the Official Receiver.

Cur Adv Vult

Clement Skinner JC: This is the hearing of a petition presented for the winding-up of WWL Corrugators Sdn Bhd ('the company') under s 218 of the Companies Act 1965 ('the Act') at the instance of Genting Sanyen Industrial Paper Sdn Bhd ('the petitioner') on the grounds that the Company being unable to pay its debts, it is just and equitable that it should be wound-up.

Prior to the presentation of this petition, the petitioner had by letter made demand, twice, to the company for payment of a sum of RM797,924.12 in accordance with the provisions of s 218(2)(a) of the Act. The first request was made on 5 May 1998 and the second on 12 June 1998. No payment having been received from the company, this petition was presented on 1 August 1998. Due notice has been given to all concerned of the presentation of this petition by publishing such fact in the *New Straits Times* as well as the *Star* newspaper on 5 October 1998; and in the Government Gazette of 22 October 1998.

Only the company has given notice of its intention to appear for the purpose of opposing the petition. No creditor of the company has done so. This does not mean however that there are no other creditors to the company because there is a major creditor in the person of BSN Commercial Bank (M) Berhad ('the Bank') in whose favour the company had on 12 February 1996 executed a debenture by way of a fixed and floating charge over all its present and future assets as security for banking facilities of RM3.7m granted to the company.

Some two months after the presentation of this petition, the bank on 12 October 1998, in exercise of its rights under the debenture, appointed one Lim Tian Huat ('the receiver and manager') as the receiver and manager of all the assets and business of the company. The instrument of appointment states that the receiver and manager shall be the agent of the company.

Before me, counsel for the petitioner submitted that the consequence in law of the company neglecting to comply with the statutory demand for payment pursuant to s 218(2)(a) of the Act is that a presumption of insolvency has arisen and unless the company can show that it is able to pay its debts, a winding-up order should be made. In support, counsel referred to the case of *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1992] 1 MLJ 313 where Gunn Chit Tuan SCJ (as he then was) speaking for the Supreme Court said at p 320:

> ... the presumption of insolvency arises when the requirements of s 218(2)(a) of the Act have been satisfied and it is for the company to prove it is able to pay its debts.

I should point out however that the presumption of insolvency is a rebutable one (see *Securicor (M) Sdn Bhd v Universal Cars Sdn Bhd* [1985] 1 MLJ 84).

Learned counsel for the company concedes that a presumption of insolvency has arisen against the company but submits that although it is suggested that a winding-up order follows as a matter of course, a reading of ss 218 and 221 of the Act shows that on the hearing of a petition, a winding-up court is vested with a discretion to make a variety of orders including to dismiss a petition and that in this case, for the reasons hereafter stated, discretion should be exercised in favour of the company and the petition either dismissed or alternatively suspended until such time as the receivership is not beneficial to all creditors or is uplifted.

The submission that there is an overriding discretion reposed in the court is well supported by authority because whilst it is accepted that as

between a creditor and a company as his debtor, the creditor who proves insolvency is prima facie entitled to a winding-up order (see the judgment of Buckley J at p 331 in *Re Crigglestone Coal Co Ltd* [1906] 2 Ch 327), there are numerous cases, both local and Commonwealth, in which the overriding discretion of the court to refuse a winding-up is recognised (see *Kim Wah Theatre Sdn Bhd v Fahlum Development Sdn Bhd* [1990] 2 MLJ 511, *Cetico Sdn Bhd v The Tropical Veneer Co Bhd* [1988] 2 MLJ 665; *Re P & J Macrae Ltd* [1961] 1 All ER 302).

However, as counsel for the petitioner correctly points out, the overriding discretion of the court, like any other judicial discretion, is fairly strictly regulated and is exercised in accordance with principles that are well defined. Counsel referred to *The Law of Company Liquidation* (3rd Ed) by JO'Donovan at p 61 where the author discusses the discretion of the court in these terms:

> Its power to refuse an order is, however, fairly strictly regulated and is exercised in accordance with principles that are relatively well defined. There are, in fact, certainly no more than five, and probably only four, reasons which will justify the court in refusing to make an order on the application of an unpaid creditor. These are: (1) the applicant's debt amounts to less than $1,000; (2) the debt is bona fide disputed by the company; (3) the company has paid or tendered payment of applicant's debt; (4) winding-up is opposed by other creditors; and (5) the company is in the process of being wound-up voluntarily.

To oppose the winding-up, the company has through the receiver and manager filed an affidavit affirmed on 29 April 1999 (encl 13), in which he states the following reasons why it would not be just and equitable to order a winding-up:

(i) a winding-up would result in the company ceasing to be a going concern which would result in the company encountering tremendous difficulty in collecting various trade debts owed to the company which amount to some RM1.5m of which the company has arranged for RM500,000 to be paid to it over a one year period;

(ii) a winding-up would entail a forced and prompt disposal of the assets of the company, which are all secured in favour of the bank, without any opportunity to source potential and method of sale which will result in a greater shortfall to be suffered by the company its creditors and shareholders;

(iii) in the light of the receivership, there would be no prejudice to the petitioner if this petition were struck out because the petitioner would not as an unsecured creditor stand to receive any realisation in priority to the bank who is owed in excess of RM4m;

(iv) if the petition is struck out, the assets of the company would continue to be received and managed in the interest of the company as a whole and the receiver and manager would ascertain if the company is able, inter alia, to be taken over or sold off as a going concern;

(v) notwithstanding the apparent insolvent position of the company, the petition is a stigma against the company and its assets and would hinder the course of the receivership for the realisation of its assets.

Based on what is stated in the affidavit of the receiver and manager, counsel for the company submitted that there can be no possible benefit to the petitioner, who is an unsecured creditor, to persist in seeking a winding-up order since the bank will take the first bite in any realisation whereas as matters now stand, a receiver and manager has already been appointed and he has said that the bank's security can be far better realised as a going concern whereas the appointment of a liquidator on a winding-up order being made would not result in any benefit to the company or to its creditors but instead result in paralysis to the company and impair the realisation of the bank's security.

It was also submitted, on the authority of *Re P & J Macrae Ltd*, that as there is opposition to the winding-up and since good reasons have been given for such opposition, the petitioner must show special circumstances to warrant the making of a winding-up order.

Before considering these contentions, useful reference may again be had to *The Law of Company Liquidation* (3rd Ed) by JO'Donovan where the author discusses opposition to a winding-up.

At p 71 it is stated:

> Opposition to winding-up may proceed from the applicant's fellow creditors, who may be secured or unsecured, or from the company or (what is virtually the same thing) from the shareholders. The significance of opposition to winding-up varies in direct proportion to the relative importance of the opposing interest involved. Where the company is insolvent the foremost consideration naturally is the interests of the creditors, and these prevail over the interest of other persons likely to be affected by the winding-up, such as the company and shareholders. As regards creditors, more importance attaches to the view of unsecured creditors for the obvious reason that, unlike the secured creditors, they have no means other than winding-up by which they can obtain payment of their debts ... (and at p 72). The way in which the court's discretion is affected, if at all, by opposition to the winding-up order, varies according to whether the opposition proceeds from: (1) the company; (2) a different class of creditors from that to which the applicant is member; and (3) a majority of creditors of the same class as the applicant.

With regard to opposition to winding-up by the company, this is what the author states at p 72:

> Where the application is filed by a creditor and is opposed only by the company, or by shareholders, the applicant is entitled ex debito justitiae to a winding-up order and it is doubtful whether the court has any power to refuse the order. This, at any rate, is the position where there is only one creditor who has received no offer of payment prior to hearing of the application.

It is obvious from the above passages, that the discretion of the court is affected by where the opposition is coming from and who the opposer is and whether he is a secured or unsecured creditor and whether he belongs to a class and if so whether he represents the majority or minority view.

Reverting to the facts of our case, the position that prevails is that whilst the bank is a major creditor, it has not appeared to oppose the petition; instead, the receiver and manager has sworn an affidavit to oppose the petition. In so doing, I must take him as representing the company and that the views that he puts forward are those of the company and no one else. I say so for the following reasons: the instrument of appointment makes it clear that he shall be the agent of the company; his affidavit does not say that he represents the bank; counsel who appeared did so on behalf of the company; it would be wrong and contrary to r 28 of the Companies Winding-up Rules 1972 to allow the receiver and manager to speak for creditors who could but have not appeared. The result then is that this is a petition in which no other creditor has come forward to oppose the same and that the only opposition comes from the company itself.

In so opposing the petition, it would have been open to the company to rebut the presumption of insolvency by showing for example that the debt is genuinely disputed on substantial grounds (see *Re London and Paris Banking Corp* [1875] LR 19 Eq 444 at p 446) or demonstrating that it is not insolvent by applying either the 'quick assets test' where evidence is placed before the court of what its current assets are against its current liabilities to ascertain whether there is a deficiency (see *Re Great Eastern Hotel (Pte) Ltd* [1989] 1 MLJ 161) or by applying the 'overall assets and liabilities test' where the court looks at all the assets of a company against all its liabilities to determine its ability to pay its debts (see *Datuk Mohd Sari bin Datuk Hj Nuar v Idris Hydraulics* [1997] 5 MLJ 377). The company has not done any such thing but instead confines itself to the grounds stated in the receiver and manager's affidavit.

Eloquent though the submissions of counsel for the company have been, at the end of the day I ask myself whether the grounds relied upon are sufficient in law to defeat the prima facie right of an unsecured creditor to the remedy which exists primarily for its benefit? Having given the matter considerable thought, I have come to the conclusion that they do not and I say so for the following reasons. As I had earlier stated, the only opposition proceeds from the company itself but the debt has not been disputed and no attempt has been made to show that the company is not insolvent. In these circumstances, the foremost consideration must be the interest of the creditors; and in this case only one creditor is before the court and an unsecured creditor at that, whose views must prevail over that of the company or its shareholders. I also find that in the final analysis, the arguments put forward by the company are not really arguments for the benefit of the creditors or the company or its shareholders but are directed at preventing an impairment of the security of the bank or to facilitate the bank maximizing recovery on its security and to that extent I can give very little weight, if at all, to the submissions because in the first place, it does not lie in the mouth of the receiver and manager to espouse the cause of creditors who are not before the court and secondly, it would be unjust to deprive an unsecured creditor of his statutory remedy so as to facilitate the bank who in giving the loan, must be taken as having bargained to take the security it has as its protection against loss in the event of a winding-up (see

In *Re Crigglestone Coal Co* [1906] 2 Ch 327). I would also point out that in the case of *Re Crigglestone Coal* the company there, like here, in opposing the petition argued that a winding-up would not benefit the petitioning creditor since the debenture holders stood first in line to be paid from a realisation of assets. It was held by Buckley J at p 334 of that case that as between the petitioner and the company, it is no answer to a petition to say that the debenture holders will or may sweep away all the assets.

In addition to the above, I also find that insufficient material had been placed before me to enable me to meaningfully consider the exercise of discretion in favour of the company. Whilst it was urged upon me that a forced sale of the assets may deprive the company of realising their best potential and that striking out the petition would afford the receiver and manager an opportunity to collect the receivables, continue trading and even to consider whether the company can be sold off as a going concern, no evidence was placed before the court as to what the assets of the company consists of and what their values or potential values are and why it would be best that they be sold later than sooner. Similarly, no attempt was made to show whether if allowed to, there is good prospects of the company being able to trade out of its difficulties or whether there are outstanding commitments or contracts which make the company an attractive proposition to be sold off as a going concern in which event it would be desirable to at least postpone any winding-up.

Before concluding, I wish to deal with the submission of counsel for the company based on the case of *Re P & J Macrae Ltd*, that if good reasons are made out for opposing a petition, it is incumbent on the petitioner to show special circumstances for the making of a winding-up order. To me, it is implicit in that proposition that before any such onus passes to a petitioner there must first be good reasons shown. I have found none here and so the petitioner faces no such task. I should also state that in the course of her submissions for the company, counsel cited several authorities in support of her case. Without meaning any disrespect, I have not set out here all the arguments raised on those authorities because I found almost all were cases in which opposition to the petition came from creditors who had appeared to oppose the petition; the cases were distinguishable on their facts and consequently did not advance the case for the company.

In the result, for the reasons already given above, I find no just reason to deprive the petitioner of the order it seeks. I accordingly order that the company be wound-up.

Ordering that company be wound up.

Reported by Jafisah Jaafar